(3)

No. 99-1521

Supreme Court, U.S.
FILED
APR 14 2000
CLERK

IN THE

Supreme Court of the United States

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL AND DEWEY BULL TAIL,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF BURLINGTON NORTHERN RAILROAD COMPANY

THEODORE A. LIVINGSTON
MICHELE ODORIZZI
DANIEL G. HILDEBRAND
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

GARY L. CROSBY
BURLINGTON NORTHERN
ROAD CO.
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102-5384
(817) 352-2369

CHARLES G. COLE
Counsel of Record
SHANNEN W. COFFIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6270

GEORGE C. DALTHORP
MICHAEL E. WEBSTER RAIL-
NEIL G. WESTESEN
CROWLEY, HAUGHEY,
HANSON, TOOLE & DIETRICH
490 North 31st Street, Suite 500
Billings, Montana 59101
(408) 252-3441
Attorneys for Burlington Northern Railroad Company

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24pp

RULE 29.6 CORPORATE DISCLOSURE

Pursuant to Rule 29.6, respondent states that Burlington Northern Railroad Company, now The Burlington Northern and Santa Fe Railway Company, is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, a publicly held company.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
I. Statement of Relevant Facts	1
II. Procedural History	2
REASONS FOR DENYING THE WRIT	7
I. THE NINTH CIRCUIT'S RULING ON TRIBAL COURT JURISDICTION DOES NOT MERIT FURTHER REVIEW	7
A. The Court of Appeals Followed the General Rule of *Montana and Strate*	8
B The Tribal Road Is Irrelevant In This Case	10
C. The Statutory Issue Presented by the Petition Is Not Worthy of Certiorari	12
II. THE NINTH CIRCUIT'S EXHAUSTION ANALYSIS DOES NOT MERIT FURTHER REVIEW	14
III. PETITIONERS' CLAIM THAT THEY LACK AN ADEQUATE REMEDY IN STATE OR FEDERAL COURT DOES NOT MERIT REVIEW	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) (*en banc*) 16
Allstate Indem. Co. v. Stump, 191 F.3d 1071 (9th Cir. 1999) 15
Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2d Cir. 1997) 15
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) 8
Burlington Northern R.R. v. Red Wolf, 106 F.3d 868 (9th Cir. 1997), *vacated and remanded*, 522 U.S. 801 (1997) 3-4
Burlington Northern R.R. v. Red Wolf, 522 U.S. 801 (1997) 4-5
County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (*en banc*) 7, 11, 16
El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 10, 16-17
Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998) 16
Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 14-15
Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998) 17
Lambert v. Ryozik, 268 Mont. 219, 886 P.2d 378 (1994) 18
Montana v. Gilham, 133 F.3d 1133 (9th Cir. 1998) 18
Montana v. King, 191 F.3d 1108 (9th Cir. 1999) . 7, 11
Montana v. United States, 450 U.S. 544 1981) .... *passim*
National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) 14-15
Nevada v. Hicks, 196 F.3d 1020 (9th Cir. 1999) .. 15

TABLE OF AUTHORITIES - Continued

Page

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., No. 99-1828, 2000 U.S. App. LEXIS 5069 (1st Cir. Mar. 22 2000) 15

South Dakota v. Bourland, 508 U.S. 679 (1993) 8, 13

Strate v. A-1 Contractors, 520 U.S. 438 (1997) ... *passim*

Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138 (1984) 18

United States v. Soldana, 246 U.S. 530 (1918) 10

Williams v. Lee, 358 U.S. 217 (1959) 9-10

Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) 7, 11, 16, 18

ACTS

Act of February 12, 1889, 25 Stat. 660 ..... 1, 13

STATUTES

25 U.S.C. § 311 12

25 U.S.C. § 1326 17

COUNTERSTATEMENT OF THE CASE

The petition attacks an application of this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), to factual circumstances strikingly similar to those at issue in *Strate*. In *Strate*, a tribal court asserted jurisdiction over non-Indian defendants involved in a traffic accident on a state highway. This Court held that the tribal court had no jurisdiction because the federal right-of-way grant for the highway had deprived the Tribes of the power to exclude those nonmembers from the reservation. In this case, the Ninth Circuit held that tribal courts had no jurisdiction over a nonmember railroad because a federally-granted right-of-way had deprived the Crow Tribe of the power to exclude the railroad from the reservation.

This straightforward application of *Strate* does not raise an issue worthy of review. The petition does not demonstrate any conflict between the decision below and even a single decision of any other circuit or state supreme court. It does not show a conflict with an opinion of this Court. Nothing in the petition or in the supporting brief of the Crow Tribe suggests a need for revisiting the unanimous *Strate* decision. Accordingly, the petition should be denied.

I. Statement of Relevant Facts

Respondent Burlington Northern Railroad ("BN") is an interstate rail carrier and is not a member of the Crow Tribe. As a part of its nationwide rail system, it transports freight on a federally-granted right-of-way through the Crow Indian Reservation ("Reservation"). Pet. App. at 5a. The right of way was granted by Congress in 1889. It authorized BN's predecessor-in-interest, the Big Horn Southern Railroad, to construct, operate and maintain a railroad through the Reservation. Act of February 12, 1889, 25 Stat. 660. By statute, the right-of-way extends "seventy-five feet in width on each side of the central line of said railroad." Act § 2, 25 Stat. 660.

In 1993, two members of the Crow Tribe were killed when their automobile was struck by a BN train operating on its right-of-way. The accident occurred within the exterior boundaries of the Reservation at the intersection of BN's right-of-way and a gravel road. *See* Pet. at 7-8. At the time of the accident, the automobile in which the decedents were riding was entirely within BN's 150-foot-wide right-of-way. *Id.*; Pet. App. at 5a-6a. Neither the decedents nor their heirs, who are the petitioners in this case, had any contractual relationships with BN. Nor did the Tribe have a contractual relationship with BN. *See* Pet. App. at 26a.

II. Procedural History

A. The Tribal Court Trial

Shortly after the accident, five heirs of the decedents ("the Red Wolf heirs") filed suit in Crow Tribal Court, seeking compensation for wrongful death and other damages. BN contested tribal jurisdiction from the outset but, in the days before *Strate*, was unsuccessful in obtaining pre-trial relief in either federal or tribal court. *Burlington Northern R.R. v. Arneson*, No. CV94-156-BLG-JDS, Memorandum and Order (D. Mont. Nov. 22, 1994).

In January 1996, trial was conducted in Crow Tribal Court before a jury composed entirely of tribal members. Non-members, who constituted 25% of the population of the reservation, were excluded from the jury. Evidence admitted at trial showed that, at the time of the accident, the 17-year-old driver of the automobile had a blood alcohol level of 0.18 and the driver's mother, one of the passengers, had a blood alcohol level of 0.32 – both well in excess of the legal limit. Nevertheless, after hearing eight days of testimony, the tribal court jury announced its verdict, finding BN 100 percent liable for wrongful

death and awarding $50 million in compensatory damages to each of the five heirs, for a total award of $250 million.[1]

B. *Red Wolf I*

Immediately following entry of judgment, BN asked the tribal court to stay enforcement of the judgment without requiring BN to post a supersedeas bond. The tribal court denied that motion and ordered BN to post bond for the entire amount of the judgment, $250 million, plus interest.

Because this ruling threatened to deprive BN of subsequent federal court review of the tribal court judgment, BN sought immediate relief in the U.S. District Court for the District of Montana. The district court granted BN's motion for a preliminary injunction, preventing enforcement of the tribal court judgment during the pendency of any review proceedings in tribal or federal court. The district court then stayed any further proceedings in federal court pending exhaustion of BN's remedies in tribal court. On appeal, a divided panel of the Ninth Circuit reversed, concluding that BN had not fully exhausted all tribal court remedies. *Red Wolf I*, 106 F.3d at 871.[2]

---

[1] The trial had other serious procedural defects. For instance, during jury voir dire, a tribal appellate court judge made a personal appeal to the venire panel, in which he told the panel, "'[b]odies, in the past, bodies are scattered along the railway. Now, this is the day . . . .'" *See Burlington Northern R.R. v. Red Wolf*, 106 F.3d 868, 872 (9th Cir. 1997) (citation omitted) (Kleinfeld, J., dissenting) ("*Red Wolf I*"), *vacated and remanded*, 522 U.S. 801 (1997). This and other infirmities led one federal judge to characterize the trial as falling within the "'wave the bloody shirt' genre." *Id.* at 872 (citation omitted) (Kleinfeld, J., dissenting).

[2] Subsequently, the Red Wolf heirs filed a motion in Crow Tribal Court, unilaterally requesting that the court reduce its previous $250 million judgment to $25 million. The Crow Tribal Court entered an order reducing the judgment to $25 million on August 19, 1997.

C. *Strate v. A-1 Contractors*

While *Red Wolf I* was pending before the Ninth Circuit, this Court granted *certiorari* in *Strate v. A-1 Contractors*. BN filed a brief *amicus curiae* in *Strate*, explaining the circumstances of this case to the Court. BN argued that the Tribes could not exercise adjudicatory authority over the traffic accident in *Strate* because the Tribes did not have the power to exclude nonmembers from the federal right-of-way on which the accident occurred. *See Strate v. A-1 Contractors*, No. 95-1872, Brief of *Amici Curiae* The American Trucking Associations, Inc., The American Automobile Association and Burlington Northern Railroad Company at 11-12 (filed Dec. 1996). The *Red Wolf* proceeding was also discussed at oral argument before this Court in *Strate*.

In a unanimous decision, this Court held that because the Tribes had lost their "gatekeeping right" over the right-of-way, tribal courts could not adjudicate matters arising from the conduct of nonmembers proceeding along the highway. *Strate*, 520 U.S. at 456. In addition, although exhaustion of tribal court remedies was not at issue in *Strate*, the Court nevertheless included a footnote explaining that exhaustion was not required in a case like *Strate*. The Court explained that the exhaustion rule "must give way" where "it is plain that no federal grant provides for tribal governance over nonmembers' conduct on land covered by *Montana*'s main rule." *Id.* at 459-60 n.14.

D. *Red Wolf II*

BN subsequently petitioned this Court for review of the Ninth Circuit's *Red Wolf I* decision in light of *Strate*, arguing that, under *Strate*'s footnote 14, the railroad should be allowed to seek permanent federal relief against the exercise of jurisdiction by the Crow courts without further exhaustion of tribal remedies. The Court granted BN's petition for certiorari, vacated the panel decision and remanded the case to the Ninth Circuit for further consideration in light of *Strate*. *Burlington Northern*

R.R. v. Red Wolf, 522 U.S. 801 (1997). The Ninth Circuit, in turn, remanded the case to the district court "for further consideration in light of *Strate*." *Burlington Northern R.R. v. Red Wolf*, No. 96-35254, Order (9th Cir. Nov. 13, 1997).

On remand, the district court granted BN's motion for summary judgment, holding that the tribal court did not have jurisdiction over claims arising out of the accident. The court concluded that, as in *Strate*, the Crow Tribal Court could not exercise jurisdiction over BN since the accident occurred on BN's federally-granted right-of-way, over which the Tribe "'retained no gatekeeping right.'" Pet. App. at 23a (citation omitted). The court further held that no federal statute expressly authorized the Tribe to exercise jurisdiction over nonmembers. *Id.* at 24a-25a. It also found that this case failed to satisfy either of the exceptions to the general rule against tribal jurisdiction over nonmembers set forth in *Montana v. United States*, 450 U.S. 544 (1981). Pet. App. at 25a-27a. The district court held that tribal court exhaustion was not required under footnote 14 of *Strate*. *Id.* at 27a-28a. Finally, the court denied a motion to intervene filed by the Crow Tribe.

The Red Wolf heirs appealed to the Ninth Circuit. A panel of that Court, comprised of Judges Sidney R. Thomas and Margaret M. McKeown and Justice Byron R. White (sitting by designation), unanimously affirmed. *See* Pet. App. at 1a-15a. Relying on *Strate*, the panel reasoned that the railroad's congressionally granted right-of-way was the equivalent of alienated, non-Indian land. It rejected the argument that petitioners make here – that there would be tribal court jurisdiction if the gravel road on which the decedents were travelling was a tribal road. There was no dispute that the accident occurred entirely within BN's right-of-way. Under these circumstances, the court held that the status of the road on which the decedents were travelling "does not alter the jurisdictional calculus" because "[u]nder the congressionally-granted right-of-way, the Tribe had reserved no

power to exclude the Railroad from the reservation, nor to exercise dominion or control over the right of way." Pet. App. at 9a.

The court also declined plaintiffs' invitation to find that Congress had authorized tribal jurisdiction by directing the railroad to conduct its operations on the right-of-way with "due regard" for the Indian's interests. *Id.* at 10a. "Tribal jurisdiction over nonmembers on land subject to *Montana*'s main rule requires express congressional authorization." *Id.* The "due regard" language in the federal right-of-way statute, the court reasoned, does not constitute such express authorization. *Id.*

The Ninth Circuit rejected plaintiffs' reliance on the two exceptions to *Montana*'s main rule. First, the court concluded that no "consensual relationship" existed between BN and the Tribe as a result of the right-of-way grant. That grant, the court reasoned, was "a transfer of a property interest that does not create a continuing consensual relationship between a tribe and the grantee." *Id.* at 11a-12a. Second, the court held that tribal court jurisdiction was not necessary under *Montana*'s second exception because the interests of injured tribal members could be adequately protected by suits in state and federal court. *Id.* at 13a.

Finally, relying on *Strate*'s footnote 14, the Ninth Circuit agreed with the district court that tribal exhaustion was not required under the circumstances of the case. "Because tribal courts plainly do not have jurisdiction over this controversy pursuant to *Montana* and *Strate*, the Railroad was not required to exhaust its tribal remedies before proceeding in federal court." Pet. App. at 14a.

Petitioners subsequently sought rehearing of the panel's decision. Their petition was denied on January 6, 2000. No suggestion for rehearing *en banc* was filed.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S RULING ON TRIBAL COURT JURISDICTION DOES NOT MERIT FURTHER REVIEW

The petition asks this Court to review the Ninth Circuit's conclusion that tribal courts lack civil jurisdiction over a railroad grade-crossing accident on a federally granted right-of-way. This ruling is wholly unremarkable. It is consistent with a long line of Supreme Court decisions, beginning with *Montana v. United States*, 450 U.S. 544, and culminating in *Strate*. It also comports with post-*Strate* jurisprudence among the lower courts. *See, e.g., Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (*en banc*); *Montana v. King*, 191 F.3d 1108 (9th Cir. 1999).

Petitioners do not identify any decision – federal or state, trial or appellate – that is in conflict with the decision of the Ninth Circuit in this case. They do not point to a single judge who has articulated a conflicting viewpoint, on the same or even similar facts. They do not even attempt to make any showing that the federal or state courts are having trouble applying this Court's decision in *Strate*.

On the contrary, their principal complaint seems to be that *Strate* itself is incorrect. Petitioners criticize this Court's *Strate* decision, suggesting that it "significantly confused" the state of the law with respect to tribal jurisdiction over non-Indians and established an "ambiguous" rule. Pet. at 7, 8. However, the unanimous opinion in *Strate* is not ambiguous at all; on the contrary, it represents the logical conclusion of nearly two decades of decisions of this Court.

A. The Court of Appeals Followed the General Rule of *Montana* and *Strate*.

In *Montana*, this Court established a general rule for the exercise of tribal power over non-Indians. Authority "beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. The Court rejected the Crow Tribe's attempt to cast tribal jurisdiction over nonmembers in strict territorial terms, instead concluding that a tribe lacks such power whenever it gives up its right to exclude nonmembers from the reservation. The *Montana* Court held the Tribe could not regulate hunting and fishing by nonmembers on non-Indian fee lands, because the Tribe lacked "the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it . . . ." *Id.* at 554.[3]

The power to exclude continues as the touchstone of tribal jurisdiction over nonmembers in this Court's post-*Montana* decisions. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Court emphasized, "[r]egulatory authority goes hand in hand with the power to exclude." *Id.* at 691 n.11. "Congress . . . eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.* at 689. *See also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 423-24, 444-45 (1989). In *Strate*, the Court held that a tribal court could not exercise jurisdiction over a nonmember with respect to a traffic accident occurring on a federally-granted right-of-way within the reservation, because the Tribes

---

[3] The *Montana* Court recognized exceptions to its general rule against tribal jurisdiction for a consensual relationship or where necessary to protect the political integrity, economic security, or health and welfare of the tribe, but found both exceptions inapposite. *Id.* at 565-66.

had given up their right to exclude nonmembers from these trust lands. The right-of-way could therefore be "align[ed] . . with land alienated to non-Indians," such as the fee lands in *Montana*. 520 U.S. at 456.[4]

In this case, the Ninth Circuit did little more than apply these consistent holdings to the closely analogous facts before it. "There is no principled distinction to be made between the jurisdictional analysis applicable to a congressionally-granted highway right-of-way and a congressionally-granted railroad right-of-way. In each case, Congress has acted within its plenary power to bestow rights to a parcel of land upon one party, thereby limiting the rights of another to the same land." Pet. App. at 8a. The petition effectively asks the Court to revisit this well-settled area of law.

The cases cited do not provide a reason to do so. The Crow Tribe suggests a need for this Court to "harmonize its decision in *Strate*" with *Williams v. Lee*, 358 U.S. 217 (1959). But this Court harmonized those two cases in *Strate* itself. *Strate* reasoned that *Montana*, not *Williams*, "is the pathmarking case concerning tribal civil authority over nonmembers." 520 U.S. at 445. Following *Montana*, *Strate* characterized *Williams* as a

---

[4] The Crow Tribe points to statements in *Strate* that the highway right-of-way was granted to the State of South Dakota and that it was open to the public. *See* Crow Tribe Br. at 12. These facts were relevant in *Strate* only because the loss of the power to exclude arose from the State's opening of the highway to members of the general public. *See* 520 U.S. at 455-56. Those facts are not relevant where, as here, the non-Indian defendant has obtained directly from Congress a right to pass through the reservation. Indeed, in *Montana* itself, the Court held that the Crow Tribe lacked the power to regulate non-Indians on privately-owned fee lands, which were neither given to a governmental entity nor open to the public. *See Montana*, 450 U.S. at 548, 559.

case "fitting within [*Montana*'s] first exception." *See Strate*, 520 U.S. at 457 (citing *Montana*, 450 U.S. at 565-66).[5]

Nor does *United States v. Soldana*, 246 U.S. 530 (1918), which discussed the Tribe's title to the right-of-way, provide a reason to re-examine *Strate*. BN has not here challenged the tribe's title to the land, but only whether the Tribe can exercise jurisdiction over BN's conduct occurring on that right-of-way. In *Strate*, the Court recognized that the lands at issue belonged to the Tribes, but held that they would be governed by *Montana*'s main rule because the federal right-of-way made them "equivalent, for nonmember governance purposes," to *Montana* land. *See Strate*, 520 U.S. at 454. That holding does not need to be re-examined here.

B. The Tribal Road Is Irrelevant In This Case

Petitioners insist that this case should be accepted for review because the accident occurred at an intersection of BN's right-of-way with a subsequently-constructed tribal road. In *Strate*, this Court reserved (but did not decide) the issue of tribal court jurisdiction over an accident that occurred entirely on a tribal road. *See* 520 U.S. at 442 ("We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation."). But, as both lower courts recognized, this case does not squarely present the "tribal road" issue.

Rather, as the petitioners have admitted, this case involves an accident that occurred entirely within the bounds of a federal right-of-way. The Ninth Circuit reasoned that the critical inquiry was not whether the deceased tribal members had a right to be where they were at the time of the accident, but rather

---

[5] Similarly, *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), did not modify the scope of the *Montana* rule. That case involved a commercial lease transaction occurring on tribal land and hence implicated the first *Montana* exception. Here, by contrast, there is no voluntary commercial relationship between BN and the Tribe. Pet. App. at 26a.

whether the Tribe could exclude the non-member railroad from the reservation. Pet. App. at 9a. ("Under the congressionally-granted right-of-way, the Tribe had no reserved power to exclude the Railroad from the reservation . . . ."). This reasoning was consistent with each of the Ninth Circuit's post-*Strate* decisions, including a rare, unanimous *en banc* decision in *County of Lewis v. Allen*, 163 F.3d at 514 (tribe could not exercise jurisdiction over sheriff permitted by federal law to enter reservation). *See also Wilson v. Marchington*, 127 F.3d 805; *Montana v. King*, 191 F.3d 1108. The Ninth Circuit thus properly concluded, "[a]s in *Strate*, the Tribe had lost the 'right of absolute and exclusive use and occupation' of the right-of-way, regardless of intersecting tribal roads." Pet. App. at 9a (citation omitted).[6]

Petitioners also suggest that tribal authority is enhanced here because state and local law enforcement officials lacked authority over the accident investigation. This theory was not timely raised in the courts below.[7] In any event, this argument is neither legally nor factually sound. As a legal matter, the *Strate* Court assumed that tribal police would have some authority "to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state

---

[6] The District Court also pointed out that creating a separate jurisdictional rule for intersections of federal rights-of-way with tribal roads would inject confusion into an area previously governed by a bright-line rule. Pet. App. at 24a ("*Strate* does not suggest a different rule for incidents occurring at the intersection of federally granted rights-of-way and tribal roads. This Court sees no value in creating such a rule in an already fact-sensitive area of the law, nor is there the factual basis for creating such a rule here.").

[7] Petitioners did not raise these assertions of fact before the district court. They were not mentioned until oral argument (after merits briefing) in the Court of Appeals. On petition for rehearing, petitioners presented portions of the tribal court transcript that had not been presented in the District Court. Petitioners now improperly seek to rely on these ambiguous excerpts for their arguments about the role of the state police.

officers nonmembers stopped on the highway for conduct violating state law." *Strate*, 520 U.S. at 456 n.11. But that assumption had no bearing on the Court's analysis of tribal court jurisdiction. Furthermore, the record in this case demonstrates that state officials – specifically, a Montana state trooper – did, in fact, investigate the accident at issue. *See* Petition for Panel Rehearing of Appellants at Ex. A (filed Nov. 19, 1999). Contrary to the Petition (at 4), this was not an "all tribal" incident, both because it involved a nonmember of the tribe and because it occurred within a federal right-of-way. [8]

In short, this is not the appropriate case to decide the issue reserved in *Strate* – whether the Tribe might exercise jurisdiction over an accident that occurred wholly on a road over which the Tribe retained the power to exclude a nonmember. This case, instead, turned on a much narrower issue – whether a railroad right-of-way should be treated the same as a highway right-of-way under *Strate*. Following the consistent rationale of *Montana* and *Strate*, the Ninth Circuit correctly held that there was no principled distinction between the two federal rights-of-way. That decision does not warrant review.

C. The Statutory Issue Presented by the Petition Is Not Worthy of Certiorari

Petitioners also ask this Court to review whether certain federal statutory language authorizes tribal jurisdiction. How-

---

[8] Indeed, it is not even clear from the record whether the road intersecting BN's right of way is, in fact, a "tribal" road. The road was created upon application of a non-Indian resident pursuant to federal law, which authorizes the Secretary of the Interior to grant rights-of-way for "opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation . . . ." 25 U.S.C. § 311 (1994). *See* Ex. A to Statement of Genuine Issues of Estates of Red Wolf and Bull Tail in Response to BN's Motion for Summary Judgment (D. Mont. filed Feb. 12, 1998). Thus, the gravel road itself appears to rest on a federally granted right-of-way.

ever, the petition overlooks a crucial requirement repeatedly stated in decisions of this Court – that the authorization for the exercise of tribal authority over nonmembers must be *express*. "[A]bsent *express* authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate*, 520 U.S. at 445 (emphasis added). *Accord Montana*, 450 U.S. at 564 (tribal jurisdiction over nonmembers "cannot survive without express congressional delegation"); *Bourland*, 508 U.S. at 695 n.15 ("after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation'") (citation omitted).

As petitioners admitted below, the 1889 Act creating the right-of-way does not contain an express authorization: "[I]n 1889, Congress did not 'expressly' grant authority to the Crow Tribal Courts to adjudicate and enforce Indian rights with respect to the right-of-way . . . ." *Estates of Red Wolf v. Burlington Northern R.R.*, Brief of Appellants Red Wolf *et al.* at 22 (9th Cir.). Indeed, the Red Wolf heirs conceded that "the 'tribal court system' did not even exist in 1889." *Id.* at 21. While the Act expressly refers to the role of the *federal government* in regulating the right of way, *see* Act § 3, 25 Stat. 660 ("in accordance with such rules and regulations as the Secretary of the Interior may make"), it is silent with respect to *tribal* jurisdiction over incidents on the right-of-way. *See* Pet. at 45a.

Nor does the Indian Tribal Justice Support Act provide the requisite express authorization of tribal jurisdiction over nonmembers. That legislation is nothing more than an appropriation of funds to support the establishment of tribal courts. It cannot be read as a blanket grant of adjudicatory power to the tribes. It says nothing about the exercise of tribal jurisdiction over nonmembers. Not surprisingly, then, when the United States offered the Indian Tribal Justice Support Act as a basis for jurisdiction in *Strate*, *see* No. 95-1872, Brief of United States as Amicus Curiae Supporting Petitioners at 3-4, this Court rejected it. *See* 520 U.S. at 456 (petitioners could "refer

to no treaty or statute authorizing [the Tribes] to entertain highway-accident tort suits of the kind" commenced against the nonmember defendants). No further review of this issue is necessary.

II. THE NINTH CIRCUIT'S EXHAUSTION ANALYSIS DOES NOT MERIT FURTHER REVIEW

The petition also seeks review of the Ninth Circuit's ruling on exhaustion of tribal court remedies. However, the petition fails to mention the critical statement in *Strate* on which the Ninth Circuit's holding was predicated. This Court not only decided the issue of tribal court jurisdiction over non-Indians on federal rights-of-way, but also directed that federal courts adhere to that ruling without requiring exhaustion:

> When, as in this case, it is plain that no federal grant provides for tribal governance over nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that the tribal courts lack adjudicatory authority over disputes arising from such conduct . . . . Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.

520 U.S. at 459-60 n.14 (citations omitted).

The petition's failure to accept this statement is fatal to its exhaustion argument. For example, petitioners complain that "federal courts, rather than tribal courts, are empowered to decide, in the first instance, whether tribal jurisdiction is 'plainly' lacking." Pet. at 11-12. However, that is exactly the import of this Court's footnote in *Strate*.

Similarly, the Tribe complains of a "direct conflict" between *Strate* and this Court's earlier decisions in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). *See* Crow Tribe

Br. at 20. But *Strate* extensively addressed both cases and derived from them an exhaustion rule that was "prudential," rather than "an unyielding requirement." *See* 520 U.S. at 449 n.7, 451-53. The exception recognized in the *Strate* footnote comported with that prudential approach, because it excused compliance where exhaustion would "serve no purpose other than delay." *Id.* at 459-60 n.14.

Petitioners lament "the apparent demise of the doctrine of exhaustion of tribal court remedies." Pet. at 3. But the Ninth Circuit's own exhaustion jurisprudence belies that claim. In a pair of cases decided shortly before oral argument in this case, the Ninth Circuit relied on the prudential exhaustion rule to dismiss actions brought in federal court. *See Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999); *Nevada v. Hicks*, 196 F.3d 1020, 1029-30 (9th Cir. 1999). Other courts of appeals have required exhaustion of tribal remedies in cases decided after *Strate*. *See Basil Cook Enters. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, No. 99-1828, 2000 U.S. App. LEXIS 5069 (1st Cir. Mar. 22, 2000).

Petitioners' principal argument on the merits of the exhaustion question is that the tribal court should have had the opportunity to pass on numerous "facts" of which it had taken judicial notice. But those facts were placed in the record in the federal district court, and neither the district court nor the court of appeals court found them relevant to the jurisdictional calculus. The reason is obvious: *Strate* itself did not find similar facts relevant to its determination of tribal jurisdiction.

For example, *Strate* rejected as a matter of law the argument that the risk of personal injury or the need to provide a forum for such claims could justify jurisdiction over a nonmember. "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s

second exception requires no more, the exception would severely shrink the rule." 520 U.S. at 457-58. The Court reasoned instead that *Montana*'s second exception is implicated only where there is a threat to "'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 459 (citation omitted).

In this respect, the *Strate* Court did not adopt the reasoning of the Eighth Circuit *en banc* majority in *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (*en banc*), on which the Crow Tribe relies. Crow Tribe Br. at 24. This Court's reasoning requires the same result for a tribal plaintiff as for a nontribal plaintiff. Indeed, *Strate* did not analyze the jurisdictional question based on the identity of the injured plaintiff, but rather on whether the defendant was a member of the tribe. *See Strate*, 520 U.S. at 442 ("This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members.").

Thus, in the wake of *Strate*, courts of appeal have consistently rejected arguments that tribal jurisdiction is necessary to provide a remedy for tort claims, even when asserted by tribal members. *See, e.g., Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998); *County of Lewis*, 163 F.3d at 515; *Wilson*, 127 F.3d at 815. As the U.S. Court of Appeals for the Eighth Circuit has noted, "'[i]f providing a forum for its members would be a sufficient reason to confer subject matter jurisdiction upon the tribal courts when a tribal member is a party to a lawsuit, it follows that the tribal courts would always have civil subject matter jurisdiction over non-Indians.'" *Hornell*, 133 F.3d at 1093 (citation omitted).

Federal courts have had little trouble applying the bright-line test announced in *Strate*'s footnote 14.[9] Thus, there is no reason

---

[9] This Court did not detract from footnote 14 when it recognized complete preemption as yet another exception to the exhaustion principle in *El*

to return to the issue and provide further analysis of *Strate*'s exhaustion rule.

III. PETITIONERS' CLAIM THAT THEY LACK AN ADEQUATE REMEDY IN STATE OR FEDERAL COURT DOES NOT MERIT REVIEW

Finally, petitioners ask this Court to consider as an independent ground for *certiorari* the question whether alternative state and federal forums remain open to them. Specifically, petitioners claim that state or federal jurisdiction is foreclosed in this case because the Crow Tribe has not consented to that jurisdiction pursuant to federal law. Pet. at 14-15 (citing 25 U.S.C. § 1326).

Even if that issue had some merit – which it does not – this case would not be the proper vehicle for addressing it. Petitioners have never sought to assert their personal injury claims in either state or federal court. It would make no sense for this Court to consider here the question of whether jurisdiction would be available if and when petitioners choose to do so. Moreover, it is doubtful that this Court would want to consider this question in a context in which the parties who would presumably benefit from state or federal jurisdiction – the petitioners – are actually arguing *against* such jurisdiction.

In any event, the Ninth Circuit correctly concluded that petitioners would have an alternative forum in state or federal court. The federal statute relied upon by petitioners does not serve as an independent bar to state or federal jurisdiction where the tribes lack such jurisdiction in the first instance. It only sets the terms for concurrent state jurisdiction where the tribe already

---

Paso. See 526 U.S. 473. Moreover, this Court's decision in *El Paso* eliminates any purported conflict based on *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998), since this Court reversed the parallel decision of the Ninth Circuit (which had followed *Kerr-McGee*) and thereby effectively overruled *Kerr-McGee*.

has jurisdiction. *See Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 150 (1984) ("Nothing in the language or legislative history of Pub. L. No. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction."). The Crow Tribe itself concedes here that the federal statute at issue "does not preclude state courts from exercising jurisdiction when a tribe or its members 'seeks rather than contests' state court jurisdiction to resolve a dispute between a tribal member and nonmember, because tribal self-government is not impeded in such a case." Crow Tribe Br. at 18.

Thus, "[t]his Court . . . repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country." *Wold Eng'g*, 467 U.S. at 148 (citing cases); *Strate*, 520 U.S. at 459 n.14 (where tribal court jurisdiction is lacking, "state or federal courts will be the only forums competent to adjudicate those disputes"). Numerous federal and state courts have applied this principle. *See Wilson*, 127 F.3d at 815; *Montana v. Gilham*, 133 F.3d 1133, 1139 n.6 (9th Cir. 1998) (tribal members have the "'same rights as are accorded any other person'" in state or federal court); *Lambert v. Ryozik*, 268 Mont. 219, 222, 886 P.2d 378, 380 (1994) (Montana courts "have repeatedly affirmed the right of Indian plaintiffs to sue non-Indians in state court as a right guaranteed to all Montana citizens . . . ."). The Ninth Circuit properly rejected petitioners' spurious claim that they lack an alternative forum to hear their claims.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

THEODORE A. LIVINGSTON
MICHELE ODORIZZI
DANIEL G. HILDEBRAND
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

GARY L. CROSBY
BURLINGTON NORTHERN
ROAD CO.
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102-5384
(817) 352-2369

April 14, 2000

CHARLES G. COLE
Counsel of Record
SHANNEN W. COFFIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6270

GEORGE C. DALTHORP
MICHAEL E. WEBSTER RAIL-
NEIL G. WESTESEN
CROWLEY, HAUGHEY,
HANSON, TOOLE & DIETRICH
490 North 31st Street, Suite 500
Billings, Montana 59101
(408) 252-3441
Attorneys for Burlington
Northern Railroad Company